

REMARKS

Reconsideration of the application in view of the above amendments and the following remarks is respectfully requested.

I. Status of the Claims

Claims 1-170 are pending in this application. The office action indicates claims 2, 23, 26, 97-99, 120, 123 and 139-170 are withdrawn as relating to a non-elected species. However, Applicants elected Group I, Claims 1-44 and 96-138, and elected species 2, 3, 6 and 8. Applicants therefore elected claims 1, 3-20, 22, 24-25, 27-44, 96, 98, 100-119, 121-122 and 124-138, including those claims indicated as generic. In the Office Action mailed on September 3, 2008, claims 1, 3-22, 24, 25, 27-29, 30-34, 40-44, 96, 98, 100-119, 121, 122 and 124-138 were rejected. Claims 35-39 were not examined, despite Applicants' identification of inclusion. Furthermore, the Examiner has not indicated that these claims were withdrawn as directed to a non-elected species. Applicants are unsure of the status of claims 35-39 but believes them to be pending and under prosecution.

Applicant has cancelled claims 96, 98, 100-119, 121, 122 and 124-138.

Claims 1, 3-20, 22, 24, 25, 27-29 and 30-44, therefore, appear to remain under prosecution.

II. Rejections Under 35 U.S.C. § 101

The Examiner has rejected claims 3, 4, 6, 7, 11, 16, 103, 108, 109 and 110 under 35 U.S.C. § 101 as non-statutory subject matter as claiming software or the like which does not recite a tangible computer readable medium. MPEP 2106 IV B 1 (a) is cited in support of this

requirement. MPEP 2106 IV B does not recite any such requirement, nor does this section contain a 1(b) paragraph. MPEP 2106 sets out the procedure for determining if a claimed invention meets the statutory requirements of section 101, as interpreted by the Courts. The first step is determining whether the claims fall in one of the enumerated categories. MPEP 2106 IV B. Applicants' claims 3, 4, 6, 7, 11 and 16, as amended, clearly fall within the machine category, reciting an apparatus having a processor and sensors. The next step, as required by MPEP 2106 C, is to determine whether the claims fall into one of the Judicial Exceptions: Laws of Nature, Natural Phenomena or Abstract Ideas. The claims at issue are clearly not drawn to Laws of Nature or Natural Phenomena. With respect to Abstract Ideas, it is clear that mere mathematical algorithms are unpatentable. Applicants' claims do not recite mere mathematical algorithms - in fact, the claims, directed to an apparatus, clearly require the use of sensors and the electronic signals which are generated thereby. This would bring these claims squarely within the ambit of patentable subject matter, as stated in MPEP 2106 C "[w]hile abstract ideas, natural phenomena, and laws of nature are not eligible for patenting, methods and products employing abstract ideas, natural phenomena, and laws of nature to perform a real-world function may well be."

III. Rejections Under 35 U.S.C. § 102

The Examiner has rejected claims 1, 3, 4, 6, 7 11-22, 24-25, 27, 28, 30, 31, 35-44, 96-101, 104, 105 110-116, 118-125, 127, 128, 133-136 and 138 under 35 U.S.C. § 102(b) as anticipated by Mault, United States Patent Application Publication No. 2002/0027164. Claims 21, 97, 99, 120 and 123 were withdrawn pursuant to the election of species identified by the Examiner in the instant office action. With respect to the remaining claims, the Examiner has the

elements of “collecting a plurality of sensor signals from at least two sensors . . . utilizing a first set of signals based on one or more of said plurality of sensor signals in a first function, said first function determining how a second set of signals based on one or more of said plurality of sensor signals is utilized in one or more functions, each of said one or more second functions having an output [and] . . . wherein one or more of said outputs are used to predict said state parameter of said individual.” The Examiner merely identifies, as support for this rejection, a broad section of the Mault reference, paragraphs 39-51. No specific identification is made within this large excerpt of any of the structure or function required by the claim. Applicants have amended, directly or indirectly, all of the claims identified in this rejection, to more clearly identify the electronic relationship between the sensors, the processor and the signals generated thereby. As amended, the claim requires that a “first set of sensor output signals causes said processor to determine at least one parameter of said first function, said processor utilizing said at least one first function parameter to determine how said processor utilizes a second set of sensor output signals in said second function. . .” The cited section of the Mault reference addresses generally the use of a PDA or other computing device to obtain input from a keyboard or other data entry system to compile a list of foods, identified as “various items as and when such items are to be consumed by the user.” Paragraph 40. According to Paragraph 40, the system stores this information together with identification data to identify the food items to compile consumption information. Nutritional information is also pre-stored. Id. Paragraph 47 states clearly the function of the device: “[t]he illustrated system operates to assist individuals in attaining their dietary goals and also in preparing shopping lists for reordering consumed items. Paragraph 48 identifies returning nutritional information of products and maintaining an inventory of the user’s purchases. This allows, in Paragraph 49, the assembly of a shopping list, based on the inventory

and consumption. Paragraph 51 finally identifies the use of the aforementioned data in providing feedback to the user regarding food choices and nutritional information. None of these suggestions teach or suggest the use of sensor output incorporated in a first function to determine how a second function is utilized to derive the system output. Each of the identified functions of the Mault reference is merely utilized to input data, retrieve data and make simple mathematical calculations regarding inventory control and compiling of nutritional information based upon food consumption. The reference completely lacks the interactivity required by the claims.

The Examiner has also rejected claims 1, 3, 5-7, 9, 10, 25, 27, 29-31, 33, 34, 96, 104, 117, 119 and 128 under 35 U.S.C. § 102(e) as anticipated by Ellis, et al., United States Published Patent Application No. 2004/0102931. The Examiner has based the rejection of all of the independent claims upon Figure 71. As stated above, the rejection lacks any specificity as to the aspects of the claim found in the various elements of Figure 71. The Figure is merely a flow chart of certain operational aspects of the referenced system. The steps identified in the figure include obtaining metabolic data from the user, estimating loss of consumable nutrients, measuring a period of time, measuring the amount of the consumable carried by the user and a reminder to the user based upon meeting a predefined threshold. The figure depicts a linear relationship between the method steps. There are no conditional steps or feedback loops illustrated which would indicate any type of interrelationship between sensed conditions and derivation of output data. As with the prior rejection, there is merely a simple mathematical relationship between the input and the output. Metabolic conditions are measured, a consumption rate of a particular nutrient is estimated and an alarm is merely triggered once a preset threshold is reached.

IV. Rejections Under 35 U.S.C. § 103

The Examiner has rejected claims 8 and 32 as being obvious in light of Ellis and Eshelman, United States Patent No. 6,611,206. These claims are dependent upon the claims addressed above and are nonobvious for the same reasons given therein.

V. Conclusion

In light of the foregoing, Claims 1, 3-20, 22, 24-25 and 27-44 are in condition for allowance. Reconsideration is requested at an early date. To the extent further discussion would be useful in the Examiner's review, the Examiner is invited to contact Applicants' attorney at the number given below.

Respectfully submitted,

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